No. 83-462

In The
Supreme Court of the United States
October Term, 1983

STURM, RUGER & CO., INC.,

Petitioner,

vs.

TIM A. ZAHRTE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Petition be denied as out of time because it stems from a determination by the United States Court of Appeals for the Ninth Circuit dated May 18, 1982?

2. Was the Circuit Court of Appeals correct in reversing a Federal District Court's interpretation of state law which was clearly wrong in light of a Montana Supreme Court opinion rendered specifically on the point of law in dispute?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

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ARGUMENT

I. THE WRIT SHOULD BE DENIED IN PART BECAUSE THE PETITION IS OUT OF TIME.

Petitioner questions the decision by the Ninth Circuit Court to certify a question of unsettled state law to the Montana Supreme Court. The certification took place on

May 18, 1982, nearly one year and four months prior to the application for Petitioner's Writ of Certiorari. Petitioner apparently waited to see if the Montana Supreme Court would decide the certified questions in its favor before claiming the certification process was misused. Whatever motives Petitioner may have had, the delay which resulted places the second of Petitioner's questions clearly beyond the sixty day limit set forth in Supreme Court Rule 20.1.[1]

II. THE CIRCUIT COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION WHEN IT CERTIFIED A QUESTION OF UNCERTAIN YET IMPORTANT STATE LAW TO THE MONTANA SUPREME COURT.

The availability of the certification process has been applauded by proponents and critics alike.[2] The proce-

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[1]A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

[2]The U. S. Supreme Court indicated that the Court of Appeals should take advantage of the certification process in *Clay v. Sun Insurance Office, Ltd.*, 363 U. S. 207 (1960). Justice Frankfurter stated:

> The Florida Legislature with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubt ful question of state law to the Supreme Court of Florida for its decision.

Id. at 212.

(Continued on next page)

dure promotes federalism in that it prevents federal invasion of the state's law-making function, thus preserving state sovereignty. When certification is an option, as it presently is in half of the states (Pet. Br. 5), the Federal Courts are spared the difficult task of "divining" state law, only to find later that their prediction was incorrect. If the Circuit Court had adopted the Federal District Court's erroneous interpretation in the instant case, that is exactly what would have happened here. The Circuit Court did not use certification procedure merely to avoid its duty. Rather, it was faced with interpreting a difficult and unsettled matter of state law, and acted responsibly by certifying the questions in order to apply the correct interpretation of Montana law.

The United States Supreme Court endorsed the procedure in *Lehman Brothers v. Schein*, 416 U. S. 386 (1974), where Justice Douglas writing for a unanimous court stated:

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Justice Douglas who was at times critical of the decision by a court to resort to the procedure rather than get to the constitutional questions involved referred favorably to the Florida process:

> The Florida Supreme Court is authorized by Rule for answering certificates concerning state law questions tendered by the federal courts. We use that procedure on Florida state law perplexities (*Dresner v. Tallahassee*, 375 U. S. 136; *Aldrich v. Aldrich*, 375 U. S. 75). We cannot require the State to provide such a procedure; but by asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use.

England v. Medical Examiners, 375 U. S. 411, 433-34 (1964) (Douglas J., concurring).

> "It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court."[3]

The Circuit Court of Appeals for the Ninth Circuit has utilized Rule I of the Rules of the Montana Supreme Court (Pet. Br. 2) with utmost restraint. The best obtainable information indicates that this was the first and only time the Circuit Court has certified any questions to the Montana Supreme Court.[4]

The method of certification as employed by the Circuit Court comported with the accepted and usual course of judicial certification. Certified questions were in appropriate form. The questions did not blend questions of fact with that of the law. They were not so broad and indefinite as to admit to different answers under different circumstances. The whole case was not presented for consideration, but only a troubling and unsettled question of state law that was determinative in the appeal before the Circuit Court.

The reasons for certifying the question of whether assumption of the risk was a complete bar to a plaintiff's recovery in a strict liability action were compelling. The Circuit Court was faced with contradictory Federal Dis-

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[3]466 U. S. at 391.

[4]According to Acting Chief Justice John C. Harrison of the Montana Supreme Court.

trict Court opinions[5] and confusing state court opinions.[6] As the memorandum of the Circuit Judges indicated, "[t]here is room for substantial difference of opinion as to the correct answer to this question." (Pet. App. 5a.) There can be no doubt but that the Circuit Court properly and wisely exercised its discretion in certifying the questions under such circumstances.

Petitioner also offers the argument that the law on this issue changed subsequent to the trial. Assuming, *arguendo*, that this is the case, one must consider what would happen if there had been a trial in state court and the Montana Supreme Court "changed the law." The applicable law on appeal to the Montana Supreme Court would be their latest position on the issue in dispute. The result should be the same when the trial was held in Federal Court under diversity of citizenship.

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[5]*Compare Trust Corporation of Montana v. Piper Aircraft Corporation*, 506 F. Supp. 1093 (1981), *with Zahrte v. Sturm, Ruger and Company*, 498 F. Supp. 389 (1980). *See also, Ingram v. Dick-Char, Inc.*, No. 80-107-M, 39 St. Rep. 96 (D. Mont. 1982) where Judge Russell E. Smith declared after a review of Montana law:

> In view of this, I now believe that the defense of assumption of risk has been abolished as an absolute defense in Montana . . .

[6]*Compare Brown v. North American Manufacturing Company*, 176 Mont. 98, 576 P. 2d 711 (1978) *with Kopischke v. First Continental Corporation*, — Mont. —, 610 P. 2d 668 (1980), where the court stated:

> As stated earlier, the elements of the doctrine of assumption of the risk are not present in this case. However, when this situation does arise, we will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute.
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> 610 P. 2d at 687.

III. THE CIRCUIT COURT OF APPEALS ACTED RESPONSIBLY WHEN IT REVERSED A DISTRICT COURT'S INTERPRETATION OF STATE LAW WHICH WAS CLEARLY WRONG.

Petitioner's argument concerning the standard by which a District Court opinion is to be reversed is simple sophistry. The general rule is that a district judge's interpretation of state law will not be reversed unless it is shown to be "clearly wrong."[1] Petitioners have taken what can only be described as indefensible liberties in their application of that standard to this case. Petitioners argue that the Circuit Court's decision to certify and the subsequent decision to reverse are "irreconcilable." This argument is incredible. Under the reasoning of the Petitioner, the certification process which has been encouraged by the Montana Supreme Court and endorsed by the United States Supreme Court, could never be used.

Rather than review the tortured argument of the Petitioner in detail, a review of the Circuit Court's actions is all that is required. When faced with unsettling and confused state law in the rapidly developing area of products liability, the Circuit Court per its discretion certified certain questions to the Montana Supreme Court. The Montana Supreme Court received the questions and answered the one which it found dispositive to the issues on appeal. The conclusion of the Montana Supreme Court concerning the defense of assumption of risk was directly opposite to that of the Federal District Court judge interpreting Montana law in this case. There was only one conclusion left for the Circuit Court at that point—the District Court's

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[1] *Feldman v. Simkins Industries, Inc.*, 679 F. 2d 1299 (1982).

interpretation of Montana law was "clearly wrong." The lower Court's decision was reversed accordingly.

RESPONDENT'S REQUEST FOR COSTS

This Petition is based on grounds that are obviously frivolous. One of the questions presented by Petitioner for review is untimely by well over one year. The other issue blatantly misinterprets the appropriate application of the standard of review of District Court interpretations of state law. Petitioner's argument is void of substance. Petitioner is not seeking to refine the judicial certification procedure, but merely wishes to prolong the litigation with consequent additional expenses to Respondent. Respondent therefore respectfully requests this Court to order that Petitioner pay Respondents' costs in responding to this Petition.

CONCLUSION

The decision of the Ninth Circuit to certify questions of unsettled state law to the Montana Supreme Court was entirely appropriate. For the reasons stated herein, the Petition for a Writ of Certiorari should be denied and Respondents awarded their costs.

Respectfully submitted,

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DATED October 17, 1983.